Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Joint Petition Filed by Dish Network, LLC, The United States of America, and the States of California, Illinois, North Carolina, and Ohio For Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	CG Docket No. 11-50
Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	
Petition Filed by Dish Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	

REPLY COMMENTS OF DISH NETWORK, LLC

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May 19, 2011

TABLE OF CONTENTS

Page

SUMMARY

The TCPA does not provide for broad "on behalf of" indirect liability. Rather, the TCPA was designed, and is jurisdictionally limited to, reaching the actual users of the telephone equipment – those who initiate or make phone calls. Many of the commenters ask the Commission to reject the common sense meaning of the terms "initiate" and "make" in the context of a telephone call, and instead adopt implausible definitions that would impermissibly expand the scope of the TCPA and the regulations promulgated thereunder. The Commission should reject this invitation and find that the liability provisions of the statute and regulations do not create liability for a business or person merely because they authorized an independent third party to generally market their products or services and that third party initiated an unlawful call. There is no basis – whether legal authority or common sense – to adopt the attenuated, unsupported, and impractical arguments suggested by the commenters. If the Commission concludes that the TCPA permits some type of indirect liability, the federal common law of agency is the controlling standard for interpreting the scope of such liability.

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REPLY COMMENTS OF DISH NETWORK, LLC

DISH Network, L.L.C. ("DISH"), through its undersigned counsel, respectfully submits these reply comments in the above-captioned proceeding.[1] While DISH has already addressed the majority of the issues raised by various commenters, DISH specifically submits these reply

[1] *Public Notice*, Consumer and Governmental Affairs Bureau Seeks Comment on the *Joint Petition Of Dish Network, LLC And The United States, The States Of California, Illinois, North Carolina, And Ohio For An Expedited Clarification Of And Declaratory Ruling On The Telephone Consumer Protection Act of 1991*; the *Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protect Act (TCPA) Rules; and the Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50, DA 11-694 (rel. Apr. 4, 2011).

comments to address arguments raised in the comments filed by: (a) the States of California, Illinois, North Carolina and Ohio (the "State Plaintiffs"); (b) the United States (the "DOJ"); (c) the Federal Trade Commission (the "FTC"); and (d) Phillip Charvat and other individual consumer comments (the "Consumers") (collectively, the "Commenters").

I. AS A THRESHOLD MATTER, THE COMMISSION SHOULD DISREGARD THE COMMENTERS' ALLEGATIONS REGARDING DISH'S BUSINESS PRACTICES, WHICH ARE DISPUTED BY DISH, IN INTERPRETING THE TCPA AND ITS REGULATIONS

In their comments, the Commenters make numerous outrageous, factually incorrect assertions about DISH's business practices and the business practices of independent third party retailers, and the alleged consumer harm that DISH and independent third party retailers have purportedly caused. DISH vigorously disputes these factual assertions, and those issues will ultimately be adjudicated in the case pending in the United States District Court for the Central District of Illinois, and not this forum. The facts specific to DISH, however, are irrelevant to the instant matter, and some of the Commenters' substantial discussion of such asserted facts in their comments, if anything, simply reinforces the absence of legal authority for their position.

The issues before the FCC in this proceeding are whether the TCPA and its implementing regulations provide for "on behalf of" liability, and, if so, does that liability extend to any business even when the basis for that liability is attributable solely on the acts of another. The determination by the FCC on these issues will provide the framework for actions brought by the FCC, State Attorneys General, and/or individual plaintiffs as to TCPA claims. While some Commenters (and Petitioners), have sought to use this process to gain a litigation advantage against DISH (often mischaracterizing or omitting key facts about DISH), this proceeding is not

limited to DISH. The FCC's decision will apply to all businesses in which a third party might entially use the phone while selling a brand-named product and/or service. Given the potential scope of liability that would be created out of thin air, and the ripple effect it will have on the economy at large, it would be both myopic and improper for the FCC to refer to Commenters' unsupported allegations about a particular business's practices as a basis for its consideration of the significant questions before it.

II. THE COMMISSION SHOULD REJECT THE INVITATION TO IMPERMISSIBLY EXPAND THE AUTHORITY CONFERRED UPON IT BY CONGRESS BASED UPON IMPLAUSIBLE AND UNSUPPORTED DEFINITIONS OF "INITIATE" AND "MAKE"

None of the Commenters dispute that administrative agencies, like the FCC, "may issue regulations only pursuant to authority delegated to them by Congress."[2] "The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'"[3] Thus, there is no dispute that the regulations at issue must be interpreted in accordance with the scope of the authority that Congress delegated to the Commission under the TCPA.[4]

It is well-settled that in the Communications Act, Congress delegated to the FCC the authority to regulate activities that constitute communication by wire or telephone.[5] As the Court of Appeals for the Seventh and D.C. Circuits have held, "the FCC may not lawfully

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2 *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

3 *Id.* at 698 (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (holding that the Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.").

4 *Id.* at 698 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

5 *American Library Ass'n*, 406 F.3d at 704-705.

exercise jurisdiction over activities that do not constitute communication by wire or radio."[6] The position DISH has espoused regarding the limited reach of the TCPA (to users or common carriers) is completely consistent with these Court of Appeals decisions. Further, none of the Commenters meaningfully challenge that, consistent with the overall reach of the Communications Act, the TCPA was designed to reach the activities of the actual users of telephone equipment (and in some instances, common carriers). Thus, the starting point of the analysis here is that Congress delegated to the FCC only the authority to promulgate regulations that would reach the users of telephone equipment (*i.e.*, "initiators" or "makers" of telephone calls) and common carriers.

As the Commenters concede, the two pertinent provisions of the TCPA authorize the FCC to promulgate regulations governing those who ***initiate*** or ***make*** telephone calls. Specifically, Section 227(b)(1)(B) of the TCPA provides that:

> [i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States— (B) ***to initiate*** any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).[7]

Similarly, Section 227(c)(3)(F) of the TCPA authorized the FCC to enact certain regulations to create a national do-not-call database, and specifically, to "prohibit any person from ***making or***

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6 *American Library Ass'n*, 406 F.3d at 704 (citing *Illinois Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1399-1400 (7th Cir. 1972)).

7 47 U.S.C. § 227(b)(1)(B) (emphasis added).

transmitting a telephone solicitation to the telephone number of any subscriber included in such database."[8]

Conceding, as they must, that Congress only authorized the FCC to create regulations aimed at those who ***initiate*** or ***make*** telephone calls, the Commenters rely upon strained and implausible interpretations of the phrases "initiate any telephone call" and "making or transmitting a telephone solicitation" in an attempt to create liability where none is provided for in the statute or regulation. Counter-intuitively, and without an iota of legislative support, the Commenters argue that a person or entity makes or initiates a telephone call by simply placing a product or service into the stream of commerce.

As set forth more fully below, (a) the Commission should reject the Commenters' invitation to adopt implausible and out-of-context definitions of the terms "initiate" and "make;" (b) the FTC's Comments and text of the Telemarketing Sales Rule (the "TSR"), including the use of the term "initiate," support DISH's position; and (c) DISH has not advocated for the restrictive interpretation described by the DOJ.

A. The Commission Should Reject The Commenters' Invitation To Adopt Implausible And Out-Of-Context Definitions Of The Terms "Initiate" And "Make"

The Commission should reject the Commenters' implausible interpretation of the TCPA and look to the plain meaning of the statute and the legislative history, both of which confirm Congress's targeted focus in enacting the TCPA – to reach the entities and individuals who make telephone calls. After all, "the plain language of the statute" is "the most reliable

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[8] 47 U.S.C. § 227(c)(3)(F) (emphasis added).

indicator of Congressional intent,"[9] and as the Supreme Court has cautioned, Congress does not "hide elephants in mouseholes."[10]

Indeed, in an attempt to impermissibly expand the TCPA from a statute with jurisdiction that is limited to reach the users of telephone equipment to one that reaches every product manufacturer and/or service provider where a third party sells those products and/or services, the Commenters rely upon dictionary definitions of "initiate" and "make" outside the context in which those terms were used by Congress. The Commenters argue that notwithstanding the legislative history that demonstrates the contrary, Congress meant that a person or entity "initiates" or "makes" a call by merely "creat[ing] a situation that resulted in telemarketing calls."[11] In the Commenters' view, a manufacturer or service provider "create[s] a situation that result[s] in telemarketing calls" by simply authorizing an independent third party retailer to sell its product or service through any sales channel, and the independent third party elects to engage in telemarketing (whether authorized or prohibited by contract from doing so). The Commenters' definitions of "initiates" and "makes" in the context of a telephone call is an "elephant in a mousehole" as it would impermissibly expand the scope of the authority delegated to the FCC by Congress. These definitions are also at odds with the language used by the FCC when it drafted the regulations promulgated under the TCPA, and they defy common sense.[12]

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9 *Soliman v. Gonzales*, 419 F.3d 276, 281–82 (4th Cir. 2005).

10 *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

11 DOJ Comments at p. 7.

12 The State Plaintiffs, FTC and DOJ also assume, without any basis in the text of the TCPA, the legislative history thereto or regulations, that the term "initiate" apportions liability to a seller.

Indeed, the FCC's own regulation uses the verb "initiate" in defining "telemarketer" as the person or entity who "initiates" a sales call.[13] Clearly, the FCC chose this word because it understood that the initiator of a call is the person or entity making the call. There can be no debate that the FCC intended to define "telemarketer" as the person or entity who actually makes the telephone call, as opposed to a "seller" who hires an employee or third party for the specific purpose of initiating telephone calls to sell its product.[14] To accept the Commenters' position, the FCC would be required to find that the term "initiate" means one thing when used by the FCC to define telemarketer, and something different when used in other provisions of the regulation and by Congress. The Commenters' position would also require the FCC to find that a seller is indistinguishable from a telemarketer.[15] This is squarely inconsistent with the regulatory history of the regulations, wherein the FCC stated that "[t]he 'seller' and 'telemarketer' may be the same entity or separate entities."[16] Clearly, there are instances when a seller performs its own sales calls as both a seller and telemarketer. But when a seller hires someone else to make sales calls, the telemarketer and the seller are two different entities.[17]

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13 47 C.F.R. § 64.1200(f)(9).

14 *Id.*

15 If the term "initiate" includes not only the person that directly places a call, but also the person on whose behalf the call was placed, then the term "seller" is redundant and superfluous to the term "telemarketer." *See* 47 C.F.R. § 64.1200(f)(9) (defining a "telemarketer," in part, as "the person or entity that initiates a telephone call or message . . . .").

16 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 18 FCC Rcd 14014, n. 103 (2003).

17 Similarly, the FCC defined the term "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." Again, this definition uses the verb "initiate" to address the actual making of a telephone call – not merely authorizing a third party or person to independently sell products or services on their own accord who may or may not make telephone calls for sales purposes.

Tellingly, there is not one judicial decision cited by any of the Commenters that adopts the definitions that they advocate for here. In contrast, multiple courts have held that an entity that merely authorizes another party to market its product cannot be deemed to have initiated calls made by the other party.[18] Nor have the Commenters cited to any portion of the legislative or regulatory history that would support their out-of-context definitions of "initiate" or "make." As set forth in DISH's Comments, the legislative and regulatory histories demonstrate that Congress and the FCC both intended to govern, in the liability-creating provisions of the TCPA and its regulations, the actual users of the telephone equipment – the telemarketers.

B. The FTC's Comments And Text Of The TSR, Including The Use Of The Term "Initiate," Support DISH's Position

The FTC's Comments do not support the broad liability under the TCPA and regulations that is advocated by the Commenters here, but rather support DISH's position. The FTC suggests that the TCPA and the FTC's TSR were intended to be overlapping and congruent in most respects, and for that reason, the TCPA should be interpreted to provide for the broad liability suggested by the DOJ, State Plaintiffs, and Consumers.

The regulatory text of the TSR, however, is markedly distinguishable in material respects from the regulatory text of the TCPA. Indeed, the TSR provides, in pertinent part, as follows:

> It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, ***or for a seller to cause a telemarketer to engage in***, the following conduct: . . . (iii) ***Initiating*** any outbound telephone call to a person when: (B) that person's telephone number is on the "do-not-call" registry,

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[18] *See, e.g., Applestein v. Fairfield Resorts* No. 0004, 2009 WL 5604429, at *5 (Md. App. July 8, 2009); *Charvat v. EchoStar Satellite, LLC.* 676 F. Supp. 2d 668, 678-679 (S.D. Ohio 2009) (appeal pending).

> maintained by the Commission, of persons who do not wish to receive out-bound telephone calls to induce the purchase of goods or services unless [certain conditions are satisfied]. . . .[19]

The TSR recognizes two separate actors who have separate (not indistinct) roles. The seller's liability is not implicitly found from the mere existence of a call by a telemarketer, but rather the seller must cause the telemarketer to initiate the call. The TSR defines "telemarketer" as "any person who, in connection with telemarketing, ***initiates*** or receives telephone calls to or from a customer or donor,"[20] and "seller" as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."[21]

If one were to use the "dictionary" definition of "initiate" relied upon by the Commenters here in interpreting the TSR, which like the TCPA does not define "initiate," there would be no reason to have a regulation that distinguishes between telemarketers who ***initiate*** calls and sellers who ***cause*** a telemarketer to initiate a call. Rather, under the Commenters' view, the seller and the telemarketer would both be initiators of the call. Clearly the FTC ascribes the same meaning to "initiate" as DISH does here – it is the actual act of placing the telephone call.

In any event, the FTC's Comments demonstrate that the TCPA is not the only law designed to combat unwanted telemarketing calls. To the extent the FCC accepts the FTC's explanation of the reach of the TSR, and in light of the enforcement successes that the FTC describes in its Comments, the FCC should have confidence that adopting DISH's approach –

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19 16 C.F.R. § 310.4 (2003).
20 16 C.F.R. § 310.2(bb) (2003) (emphasis added).
21 16 C.F.R. § 310.2(z) (2003).

which is consistent with Congress's intent – would leave consumers' privacy protected and not create some broad immunity for sellers who cause telemarketers to make illegal calls.

C. DISH Has Not Advocated For The Restrictive Interpretation Described By The DOJ

The DOJ mischaracterizes DISH's position to try to create an impression that DISH is taking an overly restrictive view of the TCPA. First, the DOJ argues that DISH's reading of the TCPA and regulations would only create liability for the person "physically handling the telephone" and not for "telemarketing dealers."[22] This is wrong. It is DISH's position that, consistent with the statutory and regulatory history, the liability-creating provisions of the statute and regulations at issue here are on their face directed at the person or entity who initiates or makes the phone call – not a seller or some other person or entity that merely authorized another to sell its product or service. Indeed, if Congress or the FCC intended to create liability for a seller or some other entity, they could have and would have said so. They did not.

Nor has DISH advocated to "impute a scienter requirement into the regulatory scheme," as the DOJ suggests.[23] Rather, it is DISH's position that the making of a telephone call is a necessary trigger before liability can attach for a violation of the TCPA or the regulations thereunder. The maker or initiator of a call need not intend to make a "violative telemarketing call" to be in violation of the TCPA or regulations, but the person or entity must have actually made a telemarketing call before liability can attach. Put another way, while there may be an argument for strict liability for the person or entity who makes a call, the TCPA simply does not

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22 DOJ Comments at p. 7.

23 DOJ Comments at p. 7.

create liability (nor did it authorize the FCC to create liability) – strict or otherwise – for a person or entity who merely authorizes another to sell its product or service.

III. THE COMMENTERS' VARIOUS POLICY ARGUMENTS CANNOT OVERRIDE THE SCOPE OF THE AUTHORITY CONFERRED ON THE COMMISSION BY THE TCPA

The Commenters have asserted various "parades of horribles" that will result if the Commission does not adopt their expansive reading of the TCPA. Even if these "horribles" would result, which is doubtful,[24] the FCC cannot exceed the authority delegated to it by Congress. As the Supreme Court has stated about the authority of the FCC and the Communications Act, of which the TCPA is a part, "our estimations, and the [FCC's] estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934."[25] The Court of Appeals for the D.C. Circuit echoed this tenet, holding that "Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission or the courts. If the Commission believes those mandates inadequate to the task of regulating the telecommunications industry in light of changed circumstances, the Commission must take its case to Congress."[26] Thus, while advances in telecommunications practice, such as VoIP and the advent of spoofing may present hurdles in identifying callers (these same hurdles confront DISH in its efforts to identify callers to consumers who ultimately complain to DISH

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24 As set forth above, the FTC's Comments demonstrate that the TCPA is not the only law designed to combat unwanted telemarketing calls. In light of the layered regulatory scheme described by the FTC in its Comments, there is no reason for the FCC to exceed the statutory authority delegated to it by Congress.

25 *MCI v. AT&T*, 512 U.S. 218, 234 (1994).

26 *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995)

about a call), the answer to overcoming these hurdles is not a regulatory fiat, as advocated by many Commenters, but Congressional action.[27]

IV. THE COMMENTERS' READING OF PRIOR COMMISSION PRECEDENT CANNOT SUPPORT THEIR POSITION BECAUSE IT WOULD EXCEED THE TCPA'S SCOPE AND THE AUTHORITY DELEGATED TO THE FCC

The Commenters rely upon an isolated statement made in a 1995 Order that purportedly supports the proposition that the FCC regulations created "on behalf of" liability.[28] DISH maintains that the Commenters take the Commission's prior statement outside the context and it therefore does not support their position.[29] However, even if this prior statement did support the Commenters' position, such statement would exceed the TCPA's scope and the authority delegated to the agency. The law is clear that no deference can be accorded to any agency pronouncement that goes beyond the scope of its authority.[30] Consequently, even if the

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27 Indeed, with respect to spoofing, Congress has already acted, passing the Truth in Caller ID Act of 2009. The Commission is in the process of adopting rules implementing the Act. *Rules and Regulations Implementing the Truth in Caller ID Act of 2009*, Notice of Proposed Rulemaking, 26 FCC Rcd 4128 (2011).

28 Notably, Section 227(c)(5) is the only subsection of the TCPA in which the quoted phrase "on behalf of" exists; and, by its terms, § 227(c)(5) only relates to "violation[s] of the regulations prescribed under ***this subsection***" (emphasis added)—*i.e.*, § 227(c). While DISH continues to maintain that Section 227(c)(5) merely creates a procedural mechanism for a private cause of action (and, as such, the mere existence of the phrase "on behalf of" in that section does not create liability, much less vicarious liability), ***absolutely no basis exists*** under Sections 227(b)(1)(B) and (b)(3)—in their clear text, in their legislative history, or in any court case construing either of them—to impute "on behalf of" liability to a party based on the acts of a third party. Indeed, any discussion of the meaning of the quoted phrase "on behalf of" in the context of Sections 227(b)(1)(B) and (b)(3) is superfluous *ab initio*.

29 *See Comments of DISH Network*, CG Docket No. 11-50 (May 4, 2011); at pp. 16-17.

30 *See Michigan*, 268 F.3d at 1082 (no deference given to EPA's interpretation that exceeded its statutory delegation of rulemaking authority); *Davis Cnty. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1410 (D.C. Cir. 1996), *amended on other grounds*, 108 F.3d 1454 (D.C. Cir. 1997) (statutory provision did not give EPA authority to ignore categories Congress established); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, at 1119-20

FCC had made a prior pronouncement that the TCPA and its implementing regulations created "on behalf of liability," such statements would itself be in excess of the Commission's statutory authority and cannot support the Commenters' position.[31]

V. IF THE FCC DETERMINES THE TCPA PROVIDES FOR "ON BEHALF OF" LIABILITY, THE FEDERAL COMMON LAW OF AGENCY IS THE REQUIRED STANDARD FOR ITS APPLICATION

If the FCC determines that the TCPA permits holding a party liable based on the acts of a third party, then the federal common law of agency is the required standard to apply for assessing whether a party should be held liable based on the facts of a particular case.[32] While the government Commenters assert that the FCC should simply supplant the federal common law of agency here with strict third party liability based upon either their newly-crafted, dictionary-based "benefit" test[33] or a "brand name marketing" test,[34] there is no legal support for adopting either test.

(D.C. Cir. 1995) (no deference given to EPA's rule, assertedly made under general rulemaking authority, which was contrary to the statutorily defined scope of the specific section).

31 It is noteworthy that the statement was not the subject of the notice and comment procedures leading to the 1995 Order. Commenters in that proceeding did not have the opportunity to discuss the scope of the TCPA's liability-creating provisions.

32 *See* DISH Comments, CG Docket No. 11-50 (filed May 4, 2011), at 19-26, articulating in further detail the legal basis for applying the federal common law of agency to determine whether one has acted "on behalf of" another in unlawful telemarketing.

33 The DOJ and FTC assert that strict third party liability should be applied based on whether a party benefits from the telemarketing actions of another. *See* DOJ Comments, at 13 (arguing that to determine whether a call was made "on behalf of" another, the test should be whether the telemarketing call is "in the seller's interest or if it benefits the seller"); FTC Comments, at 7. (arguing a dictionary definition of "on behalf of" should apply, and thus the test should be whether the third party's telemarketing is "in the interest of," or "as a representative of," or "for the benefit of" another).

34 The State Plaintiffs assert a strict third party liability test based on whether a party even implicitly represents he's acting for another and unlawfully calls to encourage sales of another's property, goods, and services (regardless of how little or no involvement that

The two principal arguments that the government Commenters rely upon to support adoption of either test are: (1) that an undefined term in a statute should be accorded any and all definitions associated with such term in a common dictionary;[35] and (2) because, neither the TCPA nor FCC regulations expressly reference agency law, it should not be applied.[36] Neither of these theories provide a legitimate basis for rejecting the common law standard.

As to the first point, and as discussed in more detail in DISH's comments and in these reply comments above, plucking a statutory term out of context and divining its meaning directly from a common dictionary, without regard to how the term is used (or not used) throughout the statute, without regard to how the term and third party liability concept is addressed (or not addressed) in the statute's legislative history, and without regard to how the same term is used and defined in other federal statutes, is not statutory interpretation.[37] It is a simplistic end-run around the statute in order to achieve a results-based outcome that is not supported by the statute itself.

As to the second point, the government Commenters are flatly wrong on the law. It is well-established that Congress's silence on a subject cannot be taken as an inference to

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other party has in such calls). In other words, if a party telemarkets to sell in whole or part another company's brand name products or services, the brand owner should be held strictly liable for that third party's calls – essentially a "brand name marketing" test. *See* State Attorneys General Comments, at 5.

35 *See* FTC Comments at 7; DOJ Comments at 6-7; Joint Petition of Dish Network, LLC And The United States, The States Of California, Illinois, North Carolina, And Ohio For An Expedited Clarification Of And Declaratory Ruling On The Telephone Consumer Protection Act of 1991, CG Docket No. 11-50, (Mar. 31, 2011), at 24; State Attorneys General Comments at 4.

36 *See* FTC Comments at 9-10; DOJ Comments at 14.

37 *Alarm Indus. Commc'n Comm. v. F.C.C.*, 131 F.3d 1066, 1070 (D.C. Cir. 1997) (holding that the interpretation of the Telecommunications Act "presents a puzzle, and that the wooden use of a dictionary cannot solve it.")

apply an unusual modification to common law rules.[38] Rather, "to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."[39] Where, as here, the TCPA does not speak directly to how or if third party liability shall be applied in the case of unlawful telemarketing, then the federal common law of agency governs. What the Government commenters suggest by way of a dictionary-based "benefit" or "brand name marketing" test are an "unusual modification to common law rules" that have no support in either the statute or applicable case law, and, for these reasons, cannot be adopted, absent express and unequivocal Congressional adoption of them, which clearly is not the case with the TCPA.

Rather, if the Commission concludes that the TCPA permits "on behalf of liability," the law requires that federal common law agency be applied to interpret the scope of such third party liability. This is the standard that courts routinely apply in circumstances where a federal statute clearly intends for an expanded scope of liability, but does not address how it shall be applied. It also confirms that the TCPA and the FCC's implementing regulations will be consistently applied, regardless of forum in which a case is brought.

CONCLUSION

The TCPA does not provide for broad "on behalf of" indirect liability. Rather, the TCPA was designed, and is jurisdictionally limited to, reaching the actual users of the telephone equipment. The liability provisions of the statute do not create liability for a business or person

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38 *See Meyer v. Holley*, 537 U.S. 280, 286 (2003) (explaining that where Congress has not expressly addressed third party liability, then "Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification to those rules")(emphasis in original).

39 *United States v. Texas*, 507 U.S. 529, 534 (1993) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)).

merely because they authorized an independent third party to generally market their products or services and that third party initiated an unlawful call. The Commission's implementing regulations likewise do not provide for the broad, unfettered indirect liability to any party that has a nexus (however close or distant) with another who violates the TCPA and its implementing regulations. There is no basis – whether legal authority or common sense – to adopt the attenuated, unsupported, and impractical arguments suggested by the Commenters. If the Commission concludes that the TCPA permits some type of indirect liability, the federal common law of agency is the controlling standard for interpreting the scope of such liability.

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